



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes CNL, FFT

Introduction

This hearing dealt with the tenant's application pursuant to the *Residential Tenancy Act* (the "**Act**") for:

- cancellation of the Two Month Notice to End Tenancy for Landlord's Use of Property (the "**Notice**") pursuant to section 49;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The tenant's daughter (who is also one of the tenants) spoke on behalf of the tenants. The landlords were represented at the hearing by an Agent. All were given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The tenant testified, and the landlords confirmed, that the tenant served the landlords with the notice of dispute resolution form and supporting evidence package. The landlords testified, and the tenant confirmed, that the landlords served the tenant with their evidence package. I find that all parties have been served with the required documents in accordance with the *Act*.

At the outset, I advised the parties of rule 6.11 of the Residential Tenancy Branch (the "**RTB**") Rules of Procedure (the "**Rules**"), which prohibits participants from recording the hearing. The parties confirmed that they were not recording the hearing. I also advised the parties that pursuant to Rule 7.4, I would only consider written or documentary evidence that was directed to me in this hearing.

Preliminary Issue – Rule 3.17 “Consideration of new and relevant evidence”

The tenants uploaded evidence on January 31, 2022, received both by the RTB and the landlords on January 31, 2022.

Rule 3.17 states in part, “Evidence not provided to the other party and the Residential Tenancy Branch directly or through a Service BC Office in accordance with the Act or Rules 2.5 [Documents that must be submitted with an Application for Dispute Resolution], 3.1, 3.2, 3.10.5, 3.14, 3.15, and 10 may or may not be considered depending on whether the party can show to the arbitrator that it is new and relevant

evidence and that it was not available at the time their application was made or when they served and submitted their evidence.”

The landlord and Agent had the opportunity to review the information prior to the hearing and had no objection to it entered as evidence.

I reviewed the late evidence submitted and determined it may be relevant to the claim being made in the Application for Dispute Resolution. The photos show the current stage of the new home construction. This information would not have been available at the time the application was made or when they served and submitted their evidence. As the landlord has no objection to allowing the new evidence and they have had the opportunity to review it, I will allow the late evidence.

Issues to be Decided

Are the tenants entitled to:

- 1) an order cancelling the Notice;
- 2) recover the filing fee?

Is the landlord entitled to:

- 1) an order of possession.

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims, and my findings are set out below.

The parties entered into an oral month to month tenancy agreement starting March 2021. Monthly rent currently is \$3500.00 and is payable on the first of each month. The tenancy agreement was informal as the parties knew each other.

About one and one-half years ago, in July 2020, the tenants moved into the single-family dwelling. At the time, the single-family dwelling was owned by the tenants' family. The rental agreement was informal and oral. The family sold the property, and the new owners took possession in March 2021.

The tenants testified that they entered into an informal arrangement with the new owners. The tenants knew that the new owners wanted to move into the house, but the landlord agreed to let the tenants stay until the house they were building was finished.

The tenants stated that about two (2) months after the agreement to let them stay, the landlord started calling a lot, harassing them to move out. The tenants asked the landlord to stop calling.

The landlord then issued a Two (2) Month Notice signed and dated September 1, 2021. The tenants filed for dispute resolution and refused to take calls from the landlord or the landlord's agent, telling them the matter will be dealt with in arbitration.

The tenants testified that the house they are building should be finished in late June 2022 or early July 2022. They thought it would be finished sooner but there have been significant delays because of shortages of building supplies and other materials due to COVID.

They argue the landlord is breaching the oral agreement contracted at the start of the tenancy. The tenants are looking for a different rental home. Houses advertised want a 1–2-year contract, which is not feasible for them as they believe their home will be finished by summer. The tenant stated that COVID has also impacted the availability of rental properties. The tenant said they tried to negotiate with the landlord, but the attempts were unsuccessful. They fully understand that the property owners want to move in, but they have no place to go.

The landlords' Agent provided the following evidence. In March 2021, the landlord agreed to a month-to-month tenancy on the understanding that the tenants would either move into their own home or find a new rental property, whatever happened first. The Agent confirmed that the owners intended to move into the home from the time of purchase. It has been almost one year since the landlord purchased the property. The Agent points out, it is unknown when the tenants' new home will be built and argues the tenants' expectation to continue to rent under these circumstances is unreasonable and unfair to the landlord. Currently, the owners are renting a basement suite that is unsuitable for their family of five (5) and the owners of the basement suite want that additional space for their family.

The landlord also provided affirmed testimony. She stated that she and her family of five (5) currently live in a two (2) bedroom basement suite. When she agreed to let the tenants stay, she believed the duration of the tenancy would be six (6) months maximum. When she phoned the tenants in the summer she wanted to know when their house might be finished. She was dismayed to hear permits had not been issued. The home is not nearing completion and there is no guarantee it will be completed by the summer.

The landlord feels she had been more than fair with the tenants, giving them an initial six (6) months to finish building their home, an additional two (2) months with the notice and an additional two (2) months awaiting this hearing. The landlord testified that she is not open to negotiating a settlement with the tenants. She wants to move into the home that she and her family purchased close to one (1) year ago. The only concession she will, if successful in this dispute resolution hearing, allowing the tenants to remain an additional fifteen (15) days.

Analysis

I have considered the oral testimony and the documentary evidence on file. My findings are based on a balance of probabilities.

Subsection 49(3) of the *Act* allows that a landlord may end a tenancy in respect of a rental unit where the landlord or a close family member of the landlord intends, in good faith, to occupy the rental unit.

The landlord submitted into evidence the Proof of Service Notice (RTB 34) and the Two (2) Month Notice (RTB 32). The landlord served the tenant the Two (2) Month Notice on September 05, 2021, with an effective vacancy date of November 01, 2021. The Notice was attached to the door of the rental unit. The tenants could not confirm the exact date they received the notice; therefore, the notice is deemed served on September 8, 2021. I find the Two (2) Month Notice was sufficiently served pursuant to s. 88 of the *Act*.

As noted above, the effective vacancy date on the Notice was November 1, 2021. Section 49(2)(a) of the *Act* sets out the requirement to serve a notice and how the effective end date of the tenancy is calculated:

- 49** (2)(a) for a purpose referred to in subsection (3), (4), or (5) by giving notice to end the tenancy effective on a date that must be
- (i) not earlier than 2 months after the date the tenant receives the notice,
 - (ii) the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement, and
 - (iii) if the tenancy agreement is a fixed term tenancy agreement, not earlier than the date specified as the end of the tenancy.

The Two (2) Month Notice states the effective date is November 1, 2021. The notice was signed and dated September 1, 2021 and posted on the rental unit door on September 5, 2021. The Notice was deemed served on September 8, 2021, and rent is due the first day of each month. I find that the effective date of November 1, 2021, does not comply with the minimum notice period required under s. 49(2)(a)(i) of the *Act*. As a result, I find that the effective date of the Two (2) Month Notice is automatically corrected to December 1, 2021, pursuant to s. 53 of the *Act*.

According to subsection 49(8) of the *Act*, a tenant may dispute a notice to end tenancy for the landlord's use by making an application for dispute resolution within fifteen (15) days after the date the tenant receives the notice. The tenants were deemed served on

September 8, 2021, and filed the Application on September 18, 2021; therefore, the tenants were within the fifteen (15) daytime limit permitted under the *Act*.

The tenants are not disputing the reason for the Two (2) Month Notice. Both parties acknowledge it was understood at the onset the landlord would move into the rental unit when the tenants left. Rather, the tenants argue they are unable to move because the construction of their home is delayed due to COVID, and they have nowhere to live. The tenants submitted pictures showing the foundation for their home has been poured and testified that despite actively looking, are unable to secure a short-term rental. They seek to remain in the house until the end of June/July when they estimate the house will be built.

There is contradictory testimony about what was or was not agreed to when the tenancy started. The landlord testifying, she allowed the tenants to remain on the understanding that construction of their home was slated for completion within six (6) months or they would find alternate accommodations. The tenants testifying that the agreement was open ended, allowing them to rent indefinitely until their home was built. Clearly both parties walked away from the conversation with a very different understanding of what was agreed to and speaks to the importance of having written agreements. Notwithstanding the different perspectives, the argument is moot. The tenancy was a month-to-month tenancy – not a fixed term tenancy - therefore, the landlord can under the *Act* issue a Two (2) Month Notice.

While I am not unsympathetic to the tenants' situation viz., the challenges of finding short term rentals and construction delays, I find that this is not sufficient reason to cancel the Two (2) Month Notice. Instead, I find that the landlord has provided satisfactory evidence to demonstrate that they, more likely than not, intend to occupy the rental unit as stated on the Two (2) Month Notice.

Based on the evidence, I dismiss the Tenant's Application to cancel the two (2) Month Notice without leave to reapply. The landlord and the tenants should be aware that if the landlord fails to use the rental unit as stated on the Two (2) Month Notice, then pursuant to s. 51 of the *Act*, the landlord may be subject to paying the tenants the equivalent of 12 months' rent as a penalty.

Under s. 55 of the *Act*, when a Tenant's Application to cancel a Notice to End Tenancy is dismissed, and I am satisfied that the Notice to End Tenancy complies with the requirements under s. 52 that prescribe the form and content, I must grant the landlord an order of possession.

I find that the Two (2) Month Notice complies with the requirements for form and content; therefore, the landlord is entitled to an order of possession. As the effective date has now passed, the landlord is entitled to an order of possession effective two (2) days after service to the tenant pursuant to s. 55. Notwithstanding the above, the Agent and landlord stated that if the arbitration favored the landlord, the landlord agrees to an

order of possession fifteen (15) days from the date of my decision, I will, therefore, issue an order of possession effective February 21, 2022. This order may be filed in the Supreme Court and enforced as an order of that Court. The tenant is cautioned that costs of such enforcement are recoverable from the tenant.

A tenant who has received a Two (2) Month Notice is entitled to compensation in the amount of one (1) month's rent. If the tenants have already paid the last month's rent, the landlord must refund the tenants **\$3500.00**.

The tenants were not successful with their application and therefore are not entitled to recover the \$100.00 filing fee.

Conclusion

The Tenant's Application seeking cancellation of the Two (2) Month Notice is dismissed without leave to reapply. The landlord is granted an order of possession effective February 21, 2022, by 1:00 p.m. This order should be served to the Tenant as soon as possible and may be filed in the Supreme Court and enforced as an order of that Court.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under Section 9.1(1) of the *Residential Tenancy Act*.

Dated: February 7, 2022

Residential Tenancy Branch